

QUESTAR SERVICE CORP.

IBLA 89-41

Decided March 29, 1991

Appeal of a decision of the Kemmerer, Wyoming, Resource Area Manager, Bureau of Land Management, establishing the rental for communication site right-of-way WYW-71423.

Affirmed.

1. Appraisals--Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Appraisals

A BLM increase in the annual rental charge for a communications site right-of-way is properly affirmed where the holder of the right-of-way fails to establish by a preponderance of the evidence that the appraisal upon which the increase is based incorrectly determined the fair market rental value of the right-of-way by the comparable lease method of appraisal.

APPEARANCES: T. R. Blackman, Director, Property and Rights of Way, Questar Service Corporation, Salt Lake City, Utah.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Questar Service Corporation (Questar) has appealed a September 16, 1988, decision of the Kemmerer, Wyoming, Resource Area Manager, Bureau of Land Management (BLM), establishing the rental for communication site right-of-way WYW-71423 at \$1,200 per year. ^{1/}

The right-of-way site is a 400- by 400-foot area on Medicine Butte in Uinta County, Wyoming. The right-of-way was originally issued on November 6, 1980, to Mountain Fuel Supply Company with an expiration date of March 28, 2010. An assignment to Questar was approved November 18, 1985. The rental fee initially was set at \$700 per year based on a appraisal dated September 17, 1980. It remained at that rate until BLM issued the decision on appeal.

^{1/} BLM's decision also informed appellant that pursuant to 43 CFR 2803.1-2(a), the rental period was being changed from the anniversary date to the calendar year. This action is not at issue in this appeal.

BLM reappraised the subject right-of-way according to a "Communication Facility Schedule," which is embodied in a report entitled the "Wyoming Appraisal Report" (Appraisal Report) prepared by a BLM appraiser. That report determined the annual rental charge for a "typical" communications site right-of-way on various mountain tops located in the Rawlins and Rock Springs districts in southwestern Wyoming, including Medicine Butte. By applying the hypothetical annual rental for this typical site to the subject site, BLM in effect compared the subject right-of-way to the 13 private communications leases selected for the Appraisal Report (Appraisal Report at 5). Thus, it is appropriate to review the methodology of the Appraisal Report.

In selecting these 13 leases, BLM focused on the most recent leases because they reflected rental charges negotiated by sophisticated lessors who recognized the value of their land for such multiple uses. Id. at 3. The annual rental charges for these 13 leases, which were issued between August 1974 and December 1984, ranged from \$1,000 to \$2,400. BLM expressly excluded two private leases issued for the location of an FM transmitter because the annual rental charges for these leases indicated that different rental charges applied to this type of use. Id. at 4. BLM also evidently excluded two additional private leases issued by Union Pacific Land Resources, Inc., because that lessor, in determining rental charges, relied on private leases issued by the Rock Springs Grazing Association, which were already represented amongst the 13 leases. See Appraisal Report at 5. Eliminating these leases rendered the range in annual rental charges from \$1,000 to \$1,800.

Of the remaining private leases, BLM selected four leases that were considered representative of the different elements characteristic of communications site leases, i.e., size of the site, availability of utilities, whether first or secondary use, whether new or renewed lease, whether lessee has renewal rights, and the cost of access. The annual rental charges for three of these four leases was \$1,200; the fourth was \$1,465. BLM then considered the impact of these different elements on the value of the leases for rental purposes in order to determine whether it was necessary to make an adjustment to the rental value of the private leases so as to make them comparable to the typical communications site right-of-way. BLM concluded, however, that no adjustment needed to be made in the case of size, availability of utilities, first or secondary use, and new or renewed lease because these factors had no discernible effect on value. In the case of renewal rights, BLM stated that no adjustment was necessary because both the private leases and BLM rights-of-way had such rights. Finally, BLM noted that, of the four leases, only one levied a one-time charge for providing access. Annualizing this charge over the life of the lease, BLM determined that it had an annual value of \$265, thus reducing the annual rental charge for that lease to \$1,200 (Appraisal Report at 6).

Accordingly, BLM concluded that the "lease rent for all four leases was \$1,200.00 per year." BLM further concluded that the "annual rent for th[e] typical [communications] site [right-of-way] would be \$1,200.00." Id. at 6. That is the rental rate adopted by the Area Manager with respect to the subject right-of-way.

[1] Section 504(g) of the Federal Land Policy and Management Act of 1976 (FLPMA), as amended, requires the holder of a right-of-way to "pay in advance the fair market value thereof as determined by the Secretary." 43 U.S.C. § 1764(g) (1988); see also 43 CFR 2803.1-2(a). BLM is required to compute rental charges for the subject right-of-way according to the fair market rental value of that right-of-way, as determined by appraisal. See Mountain States Telephone & Telegraph Co., 107 IBLA 82, 85-86 (1989). Such value is considered the amount "for which in all probability the right to use the site would be granted by a knowledgeable owner willing but not obligated to grant to a knowledgeable user who desires but is not obligated to so use." American Telephone & Telegraph Co., 25 IBLA 341, 349-50 (1976). Departmental regulations establish a fee schedule for most linear rights-of-way and provide that the rental for a nonlinear right-of-way grant is to "be based on either a market survey of comparable rentals, or on a value determination for specific parcels or groups of parcels." 43 CFR 2803.1-2(c)(3)(i).

We have recently been wary of appraisals of BLM communications site rights-of-way which relied solely on a master appraisal determining the fair market rental value of a "typical" BLM right-of-way. Our concern has stemmed from the fact that the appraisals involved merely the application of a predetermined value for a typical BLM right-of-way derived from an evaluation of the rentals charged for supposedly comparable private leases with no effort made to decide whether the right-of-way subject to appraisal actually conforms to the typical right-of-way. See Joyce Communications, Inc., 111 IBLA 255, 258 (1989). In general, we concluded that such an appraisal does not comport with the comparable lease method of appraisal, which is the preferred method for determining the fair market rental value of nonlinear rights-of-way.

In Mountain States and Joyce, the data relied upon by BLM in defining the typical site exhibited a broad range in annual rental charges amongst the private leases, and there was no analysis demonstrating how the typical site related to those private leases in order to discern how BLM determined where the typical right-of-way fell within that range. ^{2/} See Mountain States Telephone & Telegraph Co., supra at 87. Where the range in annual rental charges is wide, the concept of a typical site is of doubtful relevance. High Country Communications, Inc., 105 IBLA 14, 17 (1988). Further, BLM's use appraisal did not disclose the location of the lease sites reviewed or provide other sufficient data and analysis regarding the private leases to enable either the lessee or the Board to verify the comparability of these leases with the BLM right-of-way subject to appraisal. Joyce Communications, Inc., supra at 258. The lack of such information

^{2/} In Mountain States, the range in rental charges reviewed by BLM in connection with its master appraisal was \$300 to \$19,600 in the case of private leases issued for common carrier microwave relay use. 107 IBLA at 87. In Joyce, the range was \$200 to \$5,800 in the case of private leases issued for CATV receiver and radio-TV translator use. 111 IBLA at 257.

was deemed unfair to right-of-way-grantees because it precluded any effective challenge to the accuracy of the data on appeal, as well as any meaningful review by the Board. Mountain States Telephone & Telegraph Co., *supra* at 89.

In contrast, we recently approved BLM's use of the Appraisal Report at issue here, distinguishing it from those in Mountain States and Joyce:

In the present case, the range in annual rental charges amongst the private leases is not that great. Moreover, BLM has shown how the typical BLM right-of-way compared to private leases selected for comparison, and has identified the various factors considered potentially determinative of rental value.

By doing so, BLM properly determined that the typical BLM right-of-way fell at a certain point of the range of rental charges for the private lease transactions.

We do not imply by our acceptance of the technique of comparing a communication site right-of-way site to a typical site that a party may not challenge an assessment of rental by attacking the comparability of its site to any of the factors identified by BLM as significant, viz., "commercial power, access, phone service, 360 [degree] electronic utility, and renewal rights" (Appraisal Report at 5). Thus, for example, if a right-of-way holder can demonstrate that its access is substantially worse than that of the typical site, it may be able to successfully attack an assessment of rental equal to the rental ascribed to the typical site. A right-of-way holder could presumably so demonstrate by showing that its access is worse than that of the specific leases relied on by BLM in establishing the "typical" site. However, appellant has not done so here. ^{6/}

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^{6/} Appellant could have done so here, since (as discussed below) BLM included specific site information about the leases used to develop its typical site.

Union Pacific Railroad Co., 114 IBLA 399, 403-04 (1990).

The spreadsheet in the Wyoming appraisal listing the 13 surveyed leases contains the names of the lessors and lessees as well as the month and date the leases were first granted. A map is labeled to identify the lease locations. Even more detailed information as to the parties, including their addresses and telephone numbers, is provided by the lease data sheets which are included as addenda to the appraisal. Thus, the appraisal provided sufficient information to have allowed Questar to verify the accuracy of the information relied upon by BLM, examine the conditions at the selected lease sites and determine whether the lease sites were in fact comparable to its right-of-way site or whether BLM erred in its analysis

of the leases. Further, the information provided in the appraisal allows us to review BLM's the comparability of the leases with the BLM right-of-way, where it is challenged.

Where a correct method of appraisal has been used, the Board will uphold a decision increasing the annual rental of a right-of-way, unless it is shown that BLM failed to apply the proper criteria when calculating the fair market value rental or that the resulting rental is excessive. High Country Communications, supra at 16; Pacific Bell, 104 IBLA 66, 70 (1988). An appellant is normally required to submit another appraisal in order to present sufficiently convincing evidence that the rental charges are excessive. High Country Communications, supra at 16.

Questar has made no effort to challenge the comparability of its lease with the sites used by BLM in its Appraisal Report to formulate the typical site. Questar's sole argument on appeal is that BLM failed to consider a recent sale of a microwave site. It has submitted a letter from one of its appraisers stating that a review of sales in the Evanston area had found only one sale of a microwave site, which occurred on January 29, 1986. The site was 1 acre of land and sold for \$7,453. The appraiser states: "Based on a reasonable return of 10% per year, this sale would indicate a fair return of \$745.30 per acre per year."

This argument disregards the well-settled principle that there is no direct mathematical correlation between size of a communication site and fair market rental. American Telephone & Telegraph Co., 77 IBLA 110, 122 (1983). Thus, per-acre rental is not an appropriate measure of the value of a communications site. Questar has failed to establish the existence of even a single comparable lease with rental lower than that applied to its lease by BLM. In the absence of convincing evidence refuting BLM's implicit finding that Questar's lease was comparable to the leases used to formulate the typical site, BLM's decision is properly affirmed.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Kemmerer Resource Area Manager is affirmed.

David L. Hughes
Administrative Judge

I concur:

James L. Burski
Administrative Judge